



Westlands Water District

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November 22, 2010

The Honorable David Hayes
Deputy Secretary of the Interior
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

RE: Bay-Delta Conservation Plan

Dear David:

This letter is written to follow-up on our meeting of November 10, 2010, during which Tom Birmingham, Westlands Water District's general manager, stated that Westlands would withdraw from the Bay-Delta Conservation Plan planning process and would no longer provide funds for the completion of the BDCP. As a public agency, Westlands cannot continue to spend millions of our ratepayers' dollars on a project that is likely to deliver no more and potentially less water to the public than they are receiving today. Such an outcome is not at all consistent with the purposes of the BDCP or the assurances under which it has been undertaken. And yet that seems to be the outcome you are determined to reach. This letter is written to ensure that the reasons for our decision are neither misunderstood nor misrepresented.

To begin, it is important to put into perspective the effort to develop a BDCP. Origins of BDCP lie in the CalFED Program, which was initiated after execution of the Principles for Agreement on Bay-Delta Standards Between the State of California and the Federal Government ("Bay-Delta Accord" or "Accord") on December 15, 1994. As you know, the Bay-Delta Accord was an agreement intended to provide ecosystem protection for the Bay-Delta estuary and resolve conflicts surrounding application of the Endangered Species Act to operations of the Central Valley Project and the State Water Project.

As part of the Bay-Delta Accord Central Valley Project and State Water Project contractors voluntarily committed more than one million acre-feet of water for implementation of fishery protection actions prescribed by the Accord. In return, these contractors received a commitment that no additional water would be taken from them. Indeed, the Bay-Delta Accord states:

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No Additional Water Cost: Compliance with the take provisions of the biological opinions under the Federal Endangered Species Act (ESA) is intended to result in no additional loss of water supply annually within the limits of the water quality and operational requirements of these Principles.

At the time the Bay-Delta Accord was signed, then Secretary of the Interior Bruce Babbitt stated, “[B]asically, what we’re saying is a deal is a deal. We’ve made a deal, and if it turns there are additional requirements of any kind, it will be up to the United States and the federal agencies to come up with the water.” In addition, the contractors obtained a commitment that a number of projects would be implemented to restore the water supplies that they had voluntarily dedicated to the fishery protection actions prescribed by the Accord.

Secretary Babbitt’s promise that “a deal is a deal” was the first big lie in efforts to resolve conflicts surrounding water project operations and efforts to protect fish in the Delta. For the Central Valley Project contractors, the water supply assurances promised by the Bay-Delta Accord were short-lived. In November 1997, the Department of the Interior released a final administrative plan for the implementation of Section 3406(b)(2) of the Central Valley Project Improvement Act. Under this administrative plan and subsequent decisions regarding implementation of section 3406(b)(2), additional water was taken from south-of-Delta Central Valley Project water service contractors for the purported protection of Delta fisheries. In December 2008, the Fish & Wildlife Service issued a new biological opinion for Delta smelt that took additional water from both Central Valley Project and State Water Project contractors.

Moreover; the projects identified in the CalFED record of decision that were intended to restore the contractors’ water supply were not progressing. In 2006, before the judicial decree that resulted in the December 2008 biological opinion, then Fish & Wildlife Service regional director Steve Thompson suggested that the contractors’ best hope for constructing projects to restore water supply would be a habitat conservation plan. Mr. Thompson suggested that a habitat conservation plan was a means of avoiding what he characterized as “section 7 Hell,” where biological opinions were issued on a species by species basis and any change of circumstances required reconsultation.

After further discussions concerning the propriety of developing a habitat conservation plan, a planning agreement for the development of a habitat conservation plan was executed on October 6, 2006. The Planning Agreement provides that among its goals is to “allow for projects to proceed that restore and protect water supply, water quality, and ecosystem health within a stable regulatory framework.” The Planning Agreement also provides:

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Upon approval of the BDCP and issuance of incidental take permits for Covered Activities, USFWS and NMFS will provide assurances to those Potential Regulated Entities that receive coverage under FESA Section 10(a) that neither the USFWS nor NMFS will require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for Covered Species, without the consent of the affected Potential Regulated Entities, in accordance with 50 C.F.R. section 17.22(b)(5), section 17.32(b)(5), and section 222.307(g).

The costs of preparing the BDCP have been borne almost exclusively by Central Valley Project and State Water Project contractors in the projects' export service area. To date, these contractors have expended nearly \$150 million on consultants retained by and working under the direction of the California Department of Water Resources and the Bureau of Reclamation and other costs associated with the development of the BDCP and environmental review documents for the BDCP. The contractors have been willing to provide these funds because, until recently, it appeared that the plan being developed would achieve the dual goals of the Planning Agreement, recovery of at risk species in the Delta and water supply restoration "within a stable regulatory framework." Analyses conducted for preparation of the BDCP indicated that the construction of isolated conveyance facilities, operated pursuant to criteria proposed by the BDCP, with input from state and federal fish agencies, and the restoration of tidal marshland habitat could restore water supplies to levels comparable to water supply levels under the Bay-Delta Accord, while at the same time contributing to the recovery of at-risk species.

Over the course of the last several months, however, every indication that we have received from you, acting on behalf of the Department of the Interior, has been that, regardless of the benefits to listed species derived from the construction of isolated conveyance facilities operated pursuant to criteria proposed by the BDCP Steering Committee, and regardless of the restoration of tidal marshland habitat, exports would be arbitrarily limited. You have stated repeatedly, without explanation, that it is unrealistic for the contractors to expect to achieve water supplies that are comparable to the supplies that resulted from the Bay-Delta Accord.

Moreover, despite the prior analysis that resulted in the operational criteria proposed by the BDCP Steering Committee, the Fish & Wildlife Service is now proposing new long-term operational criteria that are more restrictive than the existing biological opinions, including more restrictive reverse flow criteria for Old and Middle Rivers. The Service's biologists are unable to explain the benefit that these more restrictive operations would have for fish. Nor can they define the scientific basis for these more restrictive operations. That is not surprising. Indeed, if the restrictions imposed by the existing biological opinions are based on the "best scientific and commercial data" available, it

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would be difficult for anyone to explain the basis for the additional restrictions the Service is now proposing.

During our meeting on November 10, we understood you to say that the operational criteria now being proposed by the Fish & Wildlife Service are for purposes of preparing alternative analyses under the National Environmental Policy Act. However, that is not our understanding. On the contrary, we understand that these new operational criteria are being proposed for inclusion in the BDCP. Moreover, NEPA does not require that a federal agency consider alternatives that will not achieve a project purpose.

Finally, Interior has suggested that, notwithstanding the commitments concerning regulatory assurances set forth in the Planning Agreement, upon issuance of incidental take permits for covered activities, it is very unlikely that the potentially regulated entities will receive any regulatory assurances that are substantially different from those provided by Section 7 of the Endangered Species Act. In other words, there will be no regulatory assurances.

All of these things have led us to conclude that it is very unlikely the existing BDCP process will result in a permitted project that will fulfill the Planning Agreement objective of restored water supplies, within a stable regulatory framework. Continued expenditures on the BDCP would therefore be a waste of resources.

This is an unfortunate outcome for the people of California and for the environment. Neither the Delta nor the economy of the State of California, which is highly dependent on imported water supplies, can recover unless our approach to solving the Delta crisis changes. There are many dedicated employees within Reclamation, the Fish & Wildlife Service, and the National Marine Fisheries Service who have tried to achieve such change. We are confident that if these individuals were permitted to direct the outcome of the BDCP process without misinformed political interference, we could achieve a successful outcome.

However, for too long, many environmental organizations have measured success in the Delta not by improvements in the Delta ecosystem or in fish abundance, but by how much water can be taken from export contractors and the communities they serve. This will not solve the water crisis or the ecosystem collapse in the Delta. But it appears that, despite the efforts of numerous federal employees, this dynamic has not changed and that you agree with the idea that "success" can be measured on the basis of how much water is taken away from the people of California.

Such a destructive approach directly undermines the objective of fixing the water supply problem. And without a project to fix the water supply problem, California won't have the means to restore the Delta either. In short, it is our view that your myopic and


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unscientific obstructionism will bring this entire effort at water reform and ecosystem restoration to a halt.

At our November 10 meeting California Secretary of Natural Resources Lester Snow correctly observed that we have collectively failed to take advantage of numerous opportunities to make meaningful progress in solving the Delta and water supplies crises and that a successful BDCP would benefit both the Delta ecosystem and the people of the state who rely on imported water supplies. It is indeed unfortunate that because you insist on continuing failed policies of punishing water agencies by imposing arbitrary water supply limits and ignoring previous commitments made by the federal government, we are about to miss yet another opportunity.

We would like to be proved wrong. As we stated during the November 10 meeting, we have no desire to walk away from the good faith efforts that Westlands and scores of others have committed to this process. But absent a change in the direction you are providing to Reclamation and Fish & Wildlife Service employees charged with completing the BDCP, we are convinced that this will be just another failed attempt to restore our water supplies and the Delta ecosystem.

Very truly yours,


Jean P. Sagouspe
President

cc: The Honorable Ken Salazar
The Honorable Dianne Feinstein
The Honorable Dennis Cardoza
The Honorable Jim Costa
The Honorable George Radanovich
The Honorable Devin Nunes
The Honorable Kevin McCarthy
The Honorable Lester Snow
Regional Director Donald Glaser
Regional Director Ren Lohoefer
Director Mark Cowin
Director John McCamman